No. [illegible]

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLANT

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INDEX

	Page
Jurisdictional Statement	1
Question Presented	2
Statute Involved	2
Statement of the Case	3
Specification of Errors	9
Summary of Argument	10
Argument:	
I. The United States took title to the goods shipped under the Inland, Carnegie, Otis, and Youngstown contracts at the shipping points	12
A. The parties so intended when they made the contracts	13
B. Alternatively, the contracts were modified later on, shortly before shipment, so as to provide for title to pass at the shipping point. In any event, when the sellers delivered the goods to the carriers the contracts to sell in futuro developed into completed sales, by which title was actually transferred at such points	24
II. Even assuming, *arguendo*, that title to each shipment remained in the seller, nonetheless the goods shipped were property of the United States within the meaning of Section 321 (a) of the Transportation Act of 1940	26
Conclusion	33

AUTHORITIES CITED

Cases:

Caldwell v. *United States*. 250 U. S. 14	28
Charles River Bridge v. *Warren Bridge*, 11 Pet. 419, 336 U. S. 420	27
Cross v. *United States*, 133 F. (2d) 183	20, 21, 29
Great Northern R. Co. v. *United States*, 315 U. S. 262	28
Illinois Central RR v. *United States*, 265 U. S. 209	32
Louisville & Nashville RR v. *United States*, 267 U. S. 395	14
Morris Plan Industrial Bank of New York v. *Schorn*, 153 F. 2d 538, 540	31
Northern Pacific R. Co. v. *United States*, 330 U. S. 248	28
Pacific Electric R. Co. v. *United States*, 71 F. Supp. 987	2
Rohmer v. *Commissioner of Internal Revenue*, 153 F. (2d) 61, cert. den. 328 U. S. 862	30

Cases—Continued | Page
Williston on Sales, 2d Ed. (1924) Sec. 286-6 31-2
26 Yale L. J. 710 30
28 Yale L. J. 721 30
Standard Oil Co. v. *Clark*, 163 F. (2d) 917 29
United States v. *Andrews*, 207 U. S. 229 14
United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401 20
Statutes:
Judicial Code, Section 128, 28 U. S. C. sec. 225 2
Transportation Act of 1940, 54 Stat. 898, 954:
Sec. 321 (a) 2, 3, 4, 9, 11, 26-29, 31
Sec. 322, 28 U. S. C. 66 2
Tucker Act, Act of March 3, 1887, 28 U. S. C. sec. 41 (20) and 761-765 1
Uniform Sales Act, secs. 17, 18, 19, 22 (a) (Cal. Civil Code, Sec. 1721-1800) 13, 23, 25
Miscellaneous:
Benjamin on Sales, 7th American Ed. (1899) 23, 25
Clark, Real Covenants, 2d Ed. 1947 31
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Restatement of Property, Secs. 3-5, 10-12, 27-30 30
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BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLANT

JURISDICTIONAL STATEMENT

Suit was filed in the United States District Court for the Southern District of California, by Pacific Electric Railway Company against the United States pursuant to the provisions of the Tucker Act, Act of March 3, 1887, 28 U. S. C. Sec. 41 (20) and 761–765, for additional freight charges (R. 2).

Following answer and trial upon stipulations of fact, the District Court entered a final judgment (R.

49) from which both parties have appealed (R. 51–2). The District Court's opinion is reported at 71 F. Supp. 987. This Court has jurisdiction to review the judgment of the District Court under Section 128 of the Judicial Code, 28 U. S. C. Sec. 225.

QUESTION PRESENTED

Whether the goods in the four shipments from the plants of the Inland, Carnegie-Illinois, Otis, and Youngstown steel companies were "property of the United States" within the meaning of the proviso reserving land-grant freight rates to the government in Section 321 (a) of the Transportation Act of 1940.

STATUTE INVOLVED

The relevant portions of the Transportation Act of September 18, 1940, 54 Stat. 898, 954, are as follows:

> SECTION 321 (a). Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use. * * *

> SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any

common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT OF THE CASE

This is an appeal from that part of the order and ıal judgment of the District Court awarding plaintiff ıe sum of $1,143.66, being the difference between ımmercial rates charged for shipments of property ıd land-grant rates paid by the Government (R. 49).

Plaintiff, as last in a series of connecting railroad ırriers, brought this action (R. 2–12) for freight ıarges allegedly due from the government at full ımmercial tariff rates on a number of shipments of ›ods, which consisted of the component parts of iberty Ships being constructed at Los Angeles Harır under the United States Maritime Commission's ›sential War Emergency Ship Construction program R. 14–21). The government contended that the ›sputed shipments were "military or naval property the United States moving for military or naval ıd not for civil use * * ." within the proviso Section 321 (a) of the Transportation Act of 1940; *ıpra;* and deducted the difference between land-grant ıd commercial rates (R. 23–39). Plaintiff's claims ere presented in eight carriers' freight bills, in›lving shipments of materials under twenty-one Gov-

ernment bills of lading, procured in accordance with eleven contracts entered into by the Maritime Commission with steel companies located in various parts of the United States.[1] All of the goods were moved on government bills of lading to the Maritime Commission at Los Angeles Harbor (California Shipbuilding Corporation in some cases receiving them as agent) (R. 21, 41).

Upon facts largely stipulated, the court below held that all twenty-one shipments were "military or naval property moving for military or naval and not for civil use," that seventeen of them were property of the United States at the time of shipment, and that those seventeen shipments were therefore entitled to land-grant rates in accordance with Section 321 (a). The court held that the remaining four shipments were not entitled to land-grant rates solely on the ground that these were not property of the United States at the time of shipment (R. 49, 50), that is to say, when being transported by rail.

From the ruling on these four shipments the Government has taken this appeal, asserting that the goods transported were property of the United States within the meaning of Section 321 (a).

The contracts pursuant to which the four disputed shipments were made comprise the following:

1. *The Inland Steel Contract* (R. 26–8, 65).[1] The

---

[1] The documents pertaining to the specific contracts and shipments may be identified from Table I, as set forth in the Appendix.

purchase order from the Maritime Commission [2] to Inland Steel Company, Indiana Harbor, Indiana, dated August 12, 1941, for steel plates (the subject of the shipment) included the following provisions (R. 26–8):

(a) Inland was requested to furnish engine room and boiler plates "in accordance with attached * * * Inland Steel Co. proposal of June 27, 1941."

(b) Prices were "Delivered Base Prices per 100# FOB Cars" Los Angeles, California.

(c) "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named." (The destination therein named was Los Angeles.)

(d) "The Seller's responsibility for delivery shall terminate on the arrival of the material at the destinations shown in this order."

(e) "Cash discount to be allowed on discount base as stated on invoice, being the delivered price of the material less the transportation charges taken into account in arriving at such price."

(f) "Such changes as may occur in the tariff freight rates or transportation charges used in determining the delivered prices provided for in this contract, except switching charges, after date of order, and on or prior to date of shipments will be for account of Buyer."

(g) "Shipments to be on Government bills of lading."

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[2] Each purchase order shows that it was negotiated for the Maritime Commission by Gibbs and Cox, Inc., a private firm of naval architects in New York. (This is the "G. & C." mentioned in the record. R. 30.)

> (h) "The equipment ordered herein is required for the construction of emergency cargo vessels."
>
> (i) "There are no written understandings or agreements between the Buyer and Seller relative to this order that are not fully referenced or expressed herein."

The Inland Steel Company's proposal referred to in paragraph (a) above, which was attached to the purchase order, stated, among other matters that:

> If the Government wishes to take possession of this material at our plant and ship on Government bills of lading in order to take advantage of land-grant freight rates, we will deduct the regular commercial freight rate, which at present is $1.10 per 100 lbs.

2. *The Carnegie Contract* (R. 29, 66).[1] The purchase order from the Maritime Commission to Carnegie-Illinois Steel Corporation, Munhall, Pennsylvania, for steel angles and steel channels (the subject of the shipment) dated June 20, 1941, was generally similar to the Inland contract. It set forth a schedule of "Delivered base prices per 100# F. O. B. cars, Los Angeles, California," and specified that "Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination named herein," and "Shipment to be made on Government bill of lading." The destination named therein was Los Angeles (R. 29).

3. *The Otis Contract* (R. 32–33, 68).[1] The purchase order from the Maritime Commission to Otis

[1] See footnote, p. 4.

Steel Company, Cleveland, Ohio, for steel plates, the subject of the shipment, was generally similar to the above purchase orders (R. 32–33). Its provisions contained the following:

> "Price—*Delivered Base Price*
>
> per 100 lbs. f. o. b. Cleveland, Ohio, plus freight all rail in carload lots * * *"
>
> There followed a list of actual delivered prices as thus calculated for several shipbuilding points. One of these was, "Terminal Island, Los Angeles, California Unit Price $3.37."
>
> "Any increase or decrease in freight rate will result in a corresponding increase or decrease in delivered price."
>
> "Price quoted herein is based on freight rates in effect at date of this quotation. If any increase in freight rates shall become effective prior to acceptance of the quotation by the Buyer, the price shown herein shall be revised accordingly."
>
> Seller's responsibility would terminate on arrival at the "fabricating point."
>
> "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point herein specified and shall not be diverted or reconsigned without permission of the Seller." The fabricating point was Los Angeles.

4. *The Youngstown Contract* (R. 33, 69).[1] The purchase order from the Maritime Commission to the Youngstown Sheet and Tube Company, Youngstown Ohio, for steel sheets, the subject of the shipment, dated November 27, 1941, provided that the price was to be "$2.60 per 100# net f. o. b. your mill, Youngs-

[1] See footnote, p. 4.

town, Ohio" (R. 33). It contained clauses as to the seller's responsibility and interest in the goods shipped thereunder, which were the same as those in the Otis contract.

The goods purchased under each of these four contracts were shipped on standard government bills of lading issued by the Maritime Commission. (Copies appear at pages 65–70 of the Record.) Among other provisions, each bill of lading recites that the carrier has received "the public property hereinafter described." The bill of lading contains, under the heading "Certificate of Issuing Officer," the designation of "F. O. B. point named in contract" and, in each case, the f. o. b. point thus designated was the location of the seller's plant, and not Los Angeles. The shipments all took place between December 9 and December 31, 1941. Their details were actually arranged by the respective sellers, using the bills of lading furnished by the Maritime Commission, and acting as agents for the Commission.

It should be noted that these four shipments were quite similar in the general patterns of the purchase contracts and bills of lading to the other seventeen shipments under government bills of lading that were resolved in favor of the government by the court below. All twenty-one shipments were integral parts of the procurement and construction of certain Liberty ships at Los Angeles, which in turn were integral parts of the entire wartime Liberty ship construction program.

The court below differentiated the four shipments from the others and held that they were not "prop-

erty of the United States" only because a provision in each of the four purchase orders purported to reserve title in the seller until arrival of the goods at "destination." It is the contention of the government that, notwithstanding such provision, the intent of the parties to these contracts was clearly to transfer title to the government at the shipping point and, alternatively, that even if title was retained by the seller, the government nevertheless had such a property interest in the goods as entitled it to the benefit of the land-grant rate reserved in the proviso of Section 321 (a) for military or naval property of the United States.

SPECIFICATION OF ERRORS

1. The District Court erred in holding that the shipments covered by government bills of lading Nos. MC–88579, MC–22992, MC–28270, and MC–34759 were not the "property of the United States" at the time of shipment, according to the meaning of that term in Section 321 (a) of the Transportation Act of 1940.

2. The District Court erred in not holding that the shipments covered by said government bills of lading were property of the United States at the time of shipment and while in transit.

3. The District Court erred in holding that the shipments covered by said bills of lading were entitled to be moved by the carriers at full commercial freight rates, and in not holding that they should have been moved at land-grant rates.

4. The District Court erred in not applying the usual rules of construction in construing the docu-

ments and acts evidencing the contractual relations between the Maritime Commission as buyer and the Inland, Carnegie, Otis, and Youngstown steel companies, respectively, as sellers.

5. The District Court erred in awarding judgment for plaintiff.

SUMMARY OF ARGUMENT

I

Upon realistic appraisal the entire transaction and course of conduct of the parties to the Inland, Carnegie, Otis, and Youngstown contracts, respectively, shows that the parties intended title to pass to the government at the time when the goods were shipped, and at the shipping points. Alternative constructions are offered, either one of which supports this contention.

A. The provisions in the proposals and purchase orders themselves, which comprise the original contracts, show a clear intent for title so to pass. The formal clauses reserving title in the seller are outweighed by other clauses specially included to express the intent for title to pass at shipping point, so as to enable the government to obtain land-grant freight rates required by the statute.

B. After the formation of the original contracts, but before the goods had been shipped, the parties demonstrated their agreement for title to pass at shipping point when the Maritime Commission issued government bills of lading for the particular goods, naming the shipping points as the f. o. b. points ac-

cording to the contracts, and when the sellers accepted and used the bills of lading as thus filled out.

In any event, the sellers did in fact transfer title to the government as buyer when, as agents for the buyer, they delivered the goods for shipment and transportation to Los Angeles according to the terms of the government bills of lading described above, which identified the goods as "public property." Through this delivery to the carriers for the account of the buyer title passed, and the executory contracts to sell *in futuro* were converted into executed sales.

In construing the situations otherwise the District Court ignored the established canons for interpreting the documents in light of the conduct of the parties, trade usages, and other relevant circumstances.

II

Even assuming that title to each shipment remained in the seller, nevertheless the goods shipped were property of the United States within the meaning of Section 321 (a) of the Transportation Act of 1940, (*supra*, p. 2). The right to land-grant rates reserved in the *proviso* of that section does not turn upon title, but upon whether the goods are "military or naval property of the United States * * *." Certainly the beneficial ownership and property interest were in the United States. It is a familiar rule of statutory construction that if any ambiguity exists in Section 321 (a) (which was a legislative grant) it should be resolved in favor of the government rather than the railroad companies. Thus, after

the carriers had received the goods from the sellers acting as agents for the buyer, the control over the goods was entirely in the government. The carriers, through the government bills of lading, acknowledged that the goods were public property, for whom the carriers were performing transportation services, subject to diversion or reconsignment at the government's direction exclusively. The carrier's liability as insurer ran to the government, which bore the risk of loss as against the seller.

Even in peacetime the property in the goods would have been in the government. The wartime requirements of priorities and allocations reinforce the conclusion that there was no vestige of control left in the sellers in respect to the goods. The inclusion of the title reservation provisions in the original contracts were at the most merely the execution of a trade custom in commercial sales to preserve a security title and keep the sale conditional rather than absolute until payment had been made. Such a consideration was quite irrelevant in a sale to the government, whose credit could not have been in doubt.

Whether or not there was a bare title left in the sellers the goods were government property unquestionably within the meaning of the statute.

ARGUMENT

I

The United States took title to the goods at the shipping points

It is the government's view that, correctly interpreted, the course of each contractual relationship between the seller and the government clearly indicates

the intent of the parties to transfer title to the goods sold at the shipping point. It is submitted that a realistic appraisal of the transaction as a whole indicates that such was the intention of the parties as originally expressed in the purchase contracts, notwithstanding the inconsistent provision in four of them reserving title in the seller. In any case, even if the title provision is deemed originally controlling, the parties modified their agreement and provided for title to pass at the shipping point, which was actually accomplished when the sales were completed through subsequent appropriation of the goods to the contract and shipment for account of the buyer.

A. The parties so intended when they made the contracts

The time of transfer of title as between seller and buyer is to be determined by the intention of the parties, which, as the District Court states, "is to be gathered from their conduct, the terms of the contract, the usages of the trade and other circumstances surrounding the transactions. Uniform Sales Act, Sec. 17, 18" (R. 43). Consequently, in determining the intent of the parties as to the moment for title to pass, it is necessary to consider the proposals and purchase orders comprising the original contracts, the bills of lading and how they were handled, and the conduct of the parties and carriers with respect to the goods when they had come into being and were turned over for shipment to Los Angeles. The inquiry should extend to the question of when the seller actually turned over all control and interest in the goods to the buyer.

At the outset it should be noted that the steel companies were following established trade selling practices and were in the process of adapting themselves to wartime conditions, converting to war production for the government, which included the Maritime Commission as federal procurement agency for this part of the gigantic mobilization. The events herein took place either shortly before or just after Pearl Harbor, and the procurement was under new wartime conditions of control through steel priorities and allocations, as well as the old specific practice of using land-grant freight rates wherever possible, through government bills of lading.

"That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary." *United States* v. *Andrews,* 207 U. S. 229, 240. "The general rule is that title passes from seller to buyer with the delivery of the goods." *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395, 400. These maxims were quoted with approval in the District Court (R. 43–4). In every instance herein the seller did deliver the goods to a common carrrier for the account of the government as buyer (R. 43, 23–38). Therefore, the District Court construed the situation as conforming to this general rule with respect to the goods purchased and delivered under the Maritime Commission's contracts with the Foster-Wheeler, Combustion Engineering, Jones & Laughlin, Republic Steel, and Joshua Hendy companies (R. 42–6). Those contracts were in the same normal pattern and with the same type of provisions

as the Inland, Carnegie, Otis, and Youngstown contracts, except that the latter included the form provision reserving title until delivery at "destination." The District Court called this provision a "manifest inconsistency," but refused to hold that the contracts as a whole fell into the same normal pattern as to title. This refusal was only through *absolute deference to this single provision,* before which the general rules of intent and sales were discarded, or, as the District Court said, *"The usual indicia of intention become immaterial"* even if the provision was *"an oversight"* (R. 45). This was error. The usual indicia may not be so discarded.

Turning to the documents themselves (in the four disputed contracts), careful examination in light of "the usual indicia" must produce one of two conclusions. The first of these alternatives is that the parties intended to pass title to the government at the shipping point, and if the clause reserving title in the seller should be deemed to conflict with this intention, it was completely outweighed by the other provisions and agreements to be read with it. (The second alternative, that there was a modification or novation is discussed later.)

The mechanics of the transactions, substantially identical in each of the eleven contracts, are particularly spelled out in the record as to the contract with Inland Steel Company, one of the four on which the District Court refused to permit land-grant rates. Further, by way of contrast, the mechanics of the Jones & Laughlin contracts are also spelled out in the

record. On these the District Court did allow land-grant rates according to the usual pattern, and comparison of the two situations is instructive.

The two Jones & Laughlin purchase orders both set forth a price basis as follows:

> Base prices per 100 lb. delivered f. o. b. cars at the shipyard, Los Angeles, California, as follows, depending on the method of shipment:
>
> | | |
> |---|---|
> | All rail shipment | $3.37 |
> | All rail shipment on government bill of lading allowing commercial rate of freight at $1.27 per 100 lb. | 3.37 |
> | Via rail and water | 2.98 |
>
> (R. 30).

Another clause, however, prescribed shipment on government bill of lading. In other words, the standard price basis was quoted with optional transportation via commercial rail billing, government rail billing, or rail-water. The government rail option was elected by the purchaser, as the order clearly shows, but the standard form price clause was left in anyway, providing for the f. o. b. point to be Los Angeles, the point of delivery or, insofar as the seller was concerned, the "destination." Taken alone, this clause would indicate that title was to pass at destination. This would have been consistent with the established policy of the steel industry to make sales on a delivered-price basis (the basing point price-plus-freight), the pricing system developed from "Pittsburgh plus."[3] However, it is quite inconsistent with

[3] See the following statement of the Carnegie-Illinois company's parent corporation:

"Steel is generally sold on a delivered price basis. A delivered price is the price of steel delivered at the town or city where the consumer of such steel is located. The use of delivered prices re-

the government bill of lading mechanism, under which delivery was to the buyer at shipping point, and the delivered-price maintenance was irrelevant. The parties went ahead and accomplished the sale and delivery at Pittsburgh, and in the Jones & Laughlin bill of lading they simply designated Pittsburgh instead of Los Angeles as the "F. O. B. point named in contract." By express provisions it was understood that the use of the government bill of lading shifted the delivery point to Pittsburgh. The *special* provisions about the bill of lading overruled the *form* price clause. In this connection, Gibbs and Cox wrote an enlightening letter to Jones & Laughlin before the purchase order was drawn up, stating that—

---

sults largely from the fact that the cost of transporting steel from the steel mill is often a substantial part of its cost at point of consumption. Buyers for this reason are seldom interested in its price at any place except where they need it. Manufacturers of steel must take this into account. * * *

"Under the so-called '*Pittsburgh plus*' practice, which the steel industry generally used until the 1920's, delivered prices were calculated on the basis of the quoted f. o. b. Pittsburgh price, with the addition of railroad freight from Pittsburgh to the buyer's destination, regardless of where the steel was produced. * * * The practice of using basing points other than Pittsburgh did not become generally prevalent until about 1924. * * * the present method of determining delivered prices in the steel industry * * * is often termed a '*multiple basing point system*.'"

The Basing Point Method of Quoting Delivered Prices in the Steel Industry, United States Steel Corporation, reprinted in Temporary National Economic Committee Hearings on Pub. Res. 113, 76th Cong., 3d Sess., part 27 (1940), Exhibit 1418, pp. 14619, 14620; also reprinted in T. N. E. C. Monograph 42 (1941), p. 31.

> The United States Maritime Commission has directed that your base price, amounting to $2.10 per 100 pounds, f. o. b. your mill be accepted, shipment to be on government bill of lading * * * (R. 30.)

It is submitted that the presence of the old delivered-basis clause in the formal order, although inconsistent, is overriden by the specific intent of the parties to do whatever had to be done to get the goods transported on government bills of lading.

At any rate, the buyer did take delivery of the goods at Pittsburgh (with title) as the bill of lading shows (R. 67); and the court below, applying the "usual indicia of intention" so found. The delivered price basis, f. o. b. Los Angeles, but with freight allowed, was treated by the parties, and by the court, as tantamount to basis f. o. b. shipping point.

From then on, even if the government had stopped the shipments in transit and diverted the materials to another shipyard, say, at San Francisco or even at Mobile, on the Gulf of Mexico, there would have been no difficulty. The goods were government property, sale had been accomplished at Pittsburgh, and an inconsistent form provision in the original purchase order providing for sale f. o. b. Los Angeles was, in view of the other provisions, a fortuitous dead letter.

Taking up now the Inland Steel contract for comparison, a reading of the provisions as a whole shows that the parties intended to execute precisely the same kind of transaction as in the Jones & Laughlin sales. The same form price basis was stated in the pur-

chase order, i. e., delivered f. o. b. Los Angeles (Supra, p. 5.) The Inland proposal, however, had stated that—

> . If the government wishes to take possession of this material at our plant and ship on government bill of lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate. * * *

We submit, upon the above analysis of the Jones & Laughlin contracts, that this, too, was tantamount to a basis f. o. b. shipping point. It is clear why this option was included, viz, to give the government land-grant rates, which required that the goods become government property at the shipping point, as signified by a government bill of lading.

The purchase order was in the same pattern as for Jones & Laughlin. The price basis was: delivered f. o. b. cars Los Angeles. This, however, was followed in the Inland contract by another form provision reserving title, not until the goods should reach Los Angeles specifically, but until they should arrive at "the destination named herein." Clearly this was but an adjunct of the delivered-price clause, with which it should stand or fall.

Again, the formal provision should yield to the substantive intent of the parties as signified by the special provisions providing for a government bill of lading expressly in order that the government could have land-grant rates. This view is reinforced by the further provision that the cash discount would be allowed on the delivered price less transportation

charges, and that changes in freight rates were for the account of the buyer.

The government bill of lading which was issued and used pursuant to this contract was in exactly the same pattern as the Jones & Laughlin bill of lading (R. 65, 67). It was issued by the Maritime Commission directly and stated that the goods were "the public property hereinafter described." It contained a certification identifying the contract, and *designating the "F. O. B. point named in contract" as Indiana Harbor,* with the added notation "freight allowed" (R. 65). As so filled out, the bill of lading was accepted, completed, and used by the Inland Steel Co. in contracting with the carrier for shipment as agent of the Maritime Commission. In evaluating these provisions of the written documents, even without considering the effect of other relevant circumstances, it is clear that, taken as a whole, the documents by themselves indicate overwhelmingly that the parties intended title to pass on shipment.

First, as the court below stated (R. 43–44), the provision for shipment on government bill of lading would normally indicate that the parties intended title to pass to the buyer upon delivery to the carrier at point of shipment. (The presumption so raised of course is not conclusive when title is obviously elsewhere (*United States* v. *Galveston, Harrisburg and San Antonio Ry.,* 279 U. S. 401; *Cross* v. *United States* (CCA 7, 1943), 133 F. 2d 183). The bill of lading and its peculiar mode of use indicate what the parties had in mind when they executed the purchase

order. Without a title transfer at shipping point the government bill of lading would have been pointless. *Cross* v. *United States, supra.*

Second, the contract itself quoted a delivered price *less transportation charges* and stipulated that changes in freight rates were for the account of the buyer. The government assumed responsibility for the transportation, changing the price to the shipping point basis, thereby showing intent to pass title upon delivery to the carrier, *as the court below concedes* (R. 44).

Third, the stipulation that the purpose of the government bill of lading was to take advantage of land-grant rates, without more, demonstrates the parties' true intent. It clearly shows that the seller as well as the buyer had in mind the very question before the court, and intended to arrange things so that the government could take advantage of the land-grant rates; this choice to be signified and accomplished by use of the special bill of lading. The failure of the court below to give any effect to this clause left it meaningless, but such a plain and unambiguous special provision may not be so ignored. It is not mere surplusage, it is a carefully worded clause having none of the earmarks of a form provision such as the provision reserving title in the seller. Unless it is to be summarily dismissed as meaningless, it can only mean that by shipment on government bill of lading the Maritime Commission exercised an option specifically given in the contract whereby it might take title at the seller's plant.

Fourth, the bill of lading used by the parties recited that the goods shipped were "public property," and the f. o. b. point designated therein was the shipping point. This was in accord with the option granted in the contract. It showed that the parties intended that if the government bill of lading were to be used, the f. o. b. point would be the shipping point. It should be emphasized that this bill of lading, with these recitals, was the sole privity between the carrier and the government, which hardly warrants the carriers' making claims contrary to its explicit language.

It may be urged, however, that besides protecting the delivered-price system there was another factor in the minds of the parties when they made the contracts with the title provisions included, viz., to leave the seller with a security title in the goods until they reached Los Angeles, for protection against failure of the buyer's credit. This would be, not until payment, but only for the days during the period of transportation. The fact that the buyer was the government made it irrelevant for even that brief period, since, once the goods were delivered, they were under exclusive government control, and the seller's reliance on being paid rested, not upon any title kept in the goods, but upon a contract with the government. The sellers showed that they surrendered all interest by allowing the shipment on the government bill of lading, thus severing themselves from any control over the goods while in transit. Nor did they retain title for the purpose of selecting railroad routes, as large industries like to do, for the bills of lading show that the choice of routes was the govern-

ment's. Nor was risk of loss in transit a consideration; the risk was on the buyer (f. o. b. means "free on board," denoting the point where risk transfers[4]). It made no difference in any case, because of the carrier's liability as insurer to the government under the bill of lading and steel is hardly a perishable.

No reason for the title provision can be found which is likely to have been in the parties' minds, other than the carry-over of a form designed to protect the delivered-price basis and possibly to preserve the *jus disponendi* while the goods were in transit. But the delivered-price basis was specifically rejected, the seller's hope for payment could not have been increased by preserving a security title for a few days, and the form provision must yield to the conclusive intention to complete the sales at the shipping points.

As against these controlling provisions, the court below held the provision reserving title in the seller until delivery in Los Angeles to be absolute—thus rejecting and rendering futile the other special provisions indicating intent to transfer title at shipping point. By so doing, the court thereby rejected the compelling circumstances and underlying reasons supporting the contrary intention of the parties themselves. Even though the contract provisions may not have been spelled out with entire precision and consistency, the contractors at least understood that the govern-

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[4] Benjamin on Sales. 7th American Edition (1899), p. 340. The risk would still be on the buyer even if the seller retained a security title. Uniform Sales Act, sec. 22 (a).

ment was to have land-grant rates by virtue of taking delivery—absolute and complete delivery—at the shipping point for shipment on government bills of lading, and that in deference to this the steel industry delivered-price policy was to be eliminated—however the carriers (who had no part) may now wish to reconstruct the transaction.

B. Alternatively, the contracts were modified later on, before shipment, so as to provide for title to pass at the shipping point. In any event, when the sellers delivered the goods to the carriers the contracts to sell in futuro developed into completed sales, by which title was actually transferred at such points.

The parties to a contract may of course modify it by mutual consent, regardless of self-imposed limitations in the original contracts. Where the contract is executory the consideration for the modifying agreement may rest in the mutual assent of the parties to the new agreement. The government's alternative view is that even if the District Court had been correct in holding the title provision as rigidly controlling in each of the original four contracts, nevertheless a modification occurred, effectively expressing their intent that the place of transfer should be the shipping points.

This was accomplished in each instance when (1) the Maritime Commission, acting through the Director of its Division of Purchase and Supply, issued the government bill of lading which identified the contract, described the goods as "public property," and designated the shipping point as the "F. O. B. point named in contract"; and (2) the seller accepted the bill of lading so certified for use in arranging the shipment.

If the modification did not then occur it occurred immediately thereafter, when the seller unconditionally appropriated specific goods to the contract by shipping them on bills of lading in favor of the buyer. The transaction then ceased to be a mere executory contract to sell *in futuro* and became a completed sale of goods.

Until the delivery of the goods to the carrier the relations of the parties were determined by the executory contracts to sell, either as originally drafted or as modified. "The American law fully agrees with the English that a delivery to a carrier, as directed by the purchaser, or as warranted by custom and usage, is such an appropriation as to bind the vendor, and make the goods the property of the vendee from the moment of such delivery, and the risk is thenceforth on him." Benjamin, *op. cit.* 351 (1899). Uniform Sales Act, sec. 22 (a). Had the seller wished to avoid this consequence of delivery to the carrier, preserving for itself the *jus disponendi,* it would have shipped the goods on a bill of lading in the seller's favor, thereby keeping the sale conditional instead of absolute. *Id.* 351. See *Id.* 4, 329–352. But by virtue of the unconditional appropriation and relinquishment, the goods left the seller's plant as property of the United States, being accepted as such by the carriers, who thenceforth looked solely to the Government for direction and for payment. Any former title reservation was supplanted by transfer to the Government which had complete control and could have diverted the goods, exactly as in the Jones & Laughlin shipments. If the goods never arrived at

Los Angeles at all, due to such diversion, the seller could not have asserted any continuing control or title. Indeed, as far as the seller was concerned, the goods had in effect reached "destination" when they were delivered and taken over by the initial carrier at the shipping point.

The foregoing analysis applies with equal force to the Carnegie, Otis, and Youngstown contracts. These also, like the Inland and the Jones & Laughlin contracts, contained formal clauses derived from the established commercial custom of the steel industry to sell on a delivered-price basis. The clauses provided a delivered price [5] and either reserved title until delivery "at the destination herein named" or provided that the goods were "the property of the seller" until delivered to the buyer at the buyer's fabricating point (R. 29, 33). Such form provisions for the reasons previously noted were thoroughly outweighed by the special provision providing that the government take the goods at the shipping point on a government bill of lading, *as was in fact done.*

II

Even assuming, arguendo, that title to each shipment remained in the seller, nonetheless the goods shipped were property of the United States within the meaning of Section 321 (a) of the Transportation Act of 1940

Even if the seller did retain title to the goods comprising each of the four disputed shipments until they

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[5] Except the Youngstown contract, which alone had its price clause (but not its general conditions) specially adapted to meet the actual situation of an f. o. b. sale.

actually arrived at Los Angeles, the government is still entitled to the benefits accorded by Section 321 (a) of the Transportation Act of 1940. The right to lower rates reserved by this statute does not turn upon title. It is "the transportation of military or naval property of the United States moving for military or naval and not for civil use," for which land-grant rates are reserved. There is no doubt that the disputed shipments, as held by the court below, were military or naval property moving for military or naval and not for civil use. A consideration of the interests therein of seller, government, and carrier, particularly in view of the war situation, leads only to the conclusion that at least the *beneficial ownership and property interest in the material was in the United States.*

In considering this question it must be borne in mind throughout that this case concerns the interpretation of a legislative grant. In Section 321 (a) Congress granted to the companies operating land-grant railroads a right of enormous value, the right to double the net freight rates previously charged on the transportation of government property over land-grant mileage. That grant is the enacting clause of Section 321 (a), to which, however, Congress attached a proviso *reserving* the public right to the old rates on "military or naval property of the United States moving for military or naval and not for civil use."

In interpreting legislative grants of this kind, it is axiomatic that they will be construed most favorably to the government. *Charles River Bridge* v. *Warren*

Bridge, 11 Pet. 420, 36 U. S. 419. This is particularly necessary in the field of rights incident to railroad land-grants. "Such grants must be construed favorably to the Government * * * nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government." *Caldwell* v. *United States,* 250 U. S. 14, 20; *Great Northern R. Co.* v. *United States,* 315 U. S. 262.

In the view of the District Court, the grant to the carriers in Section 321 (a) should be construed, despite the proviso, as extending to the transportation of "military or naval property of the United States moving for military or naval use" the higher rate, if the seller, having surrendered all control, and having made delivery to the government at shipping point, had still retained a bare title.

This would be to construe the grant to the railroad companies broadly and the reservation to the public narrowly, quite against the established rules of construction laid down by the Supreme Court *for this very clause. Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, 257 (1947). "But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *Great Northern R. Co.* v. *United States, supra,* 273. In this aspect it would be quite unreasonable to hold that in enacting the Transportation Act of September 18, 1940, in the midst of the great armament program

which it was then simultaneously inaugurating, Congress did not intend the broad reservation in the proviso to include such shipments as these—goods accumulated, controlled, paid for, and put by the government to military and naval use—the precise situation to which Congress adverted in prescribing that land-grant rates be retained.

The Congressional purpose can be fulfilled only by classifying the shipments under the four particular contracts just as the District Court classified the Jones & Laughlin shipments and all the others. (See Table I, App.) All were equally destined to go into Liberty Ships, indisputably property of the United States, and were purchased and paid for by the United States as part of a military procurement program that was entirely a government function. Congress intended that such shipments move at land-grant rates, and the parties so agreed, for the legitimate purpose of saving government funds under the emergency war conditions; and it is sheer sophistry to seek to defeat the purpose of the statute by a technical reservation of title.[6]

It is familiar law that ownership is a bundle of rights, of which title is merely one of numerous indicia. *Standard Oil Co.* v. *Clark* (C. C. A. 2), 163 F. 2d. 917 (1947). In that case the court was confronted with the problem of determining the ownership of certain stocks, patents, and other property which in 1939, upon the outbreak of World War II,

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[6] Cf. *Cross* v. *United States*, 133 F. 2d 183, where the benefit from land-grant rates was to be for the seller.

were transferred by I. G. Farbenindustrie, A. G., the great pre-war German chemical trust, to American companies. In 1942 the Alien Property Custodian took the property on the ground that it was still property of I. G. Farben notwithstanding the 1939 transfers. In the course of its opinion, the Circuit Court of Appeals for the Second Circuit said (p. 929–930):

> If the problem must be visualized in terms of title as a unit, there are various precedents cited by the District Court which tend to support its view. * * * But we do not feel that it must be so regarded. The important question is whether the interests of plaintiffs are property interests of sufficient substance that plaintiffs may recover them from the Alien Property Custodian against the latter's contention that they are merely "executory contracts." To classify plaintiffs' or defendant's interests here, under one or more of the categories of "title," "equitable servitude in property," or "contractual right" does not settle the problem. The rights of both parties can be fitted into various of these categories. Indeed, the inveterate use of the labels "property" or "title" as group symbols, denoting a "bundle" of rights or other legal relations, is now well understood; it is only when we advance beyond these forms to the questions of degree, or of number and value of such rights, that we come to a solution of problems such as this. See 1 Restatement, Property, 1936, 3, 4, 10–12, 27–30; Hohfeld, Fundamental Legal Conceptions, 1923, 3, 12, 67 et seq.; 26 Yale L. J. 710, 712, 746; 28 Id. 721, 729; *Rohmer* v. *C. I. R.*,

> 2 Cir., 153 F. 2d 61, 64, certiorari denied 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632; *Morris Plan Industrial Bank of New York* v. *Schorn,* 2 Cir., 135 F. 2d 538, 540; authorities cited in Clark, Real Covenants, 2d Ed. 1947, 4, 30, 156.

In the context of this case, when these goods were shipped on government bill of lading designating them as public property, with the f. o. b. point at seller's plant, the beneficial ownership passed to the government; a transfer resembling at least an equitable conversion occurred, and the retention of a thin legal title (or a security interest, by whatever name) by the seller did not impede the transfer of the property in the goods along with control to the United States. This was sufficient to make them property of the United States within the meaning of section 321 (a). And even if the seller's title were more than an empty shell, this would still hold true.

> It has seemed hard for the courts to understand that both seller and buyer have incidents of ownership. It is too often apparently taken for granted that one party or the other must have title, and that the other can have only a contract right; yet the illustrations in the law of divided incidents of ownership are so numerous that there seems little excuse for misunderstanding. Equity has built up a whole system of jurisprudence based on the idea of one party having the legal title and the other the beneficial incidents of ownership; and it should not be supposed that the essential features of such a relation are peculiar to equity.

> A mortgage or a security title is not different in its nature when it relates to personal property and when it relates to land. Nor should it make any difference in the essential rights of the parties in what form the security title is held, whether by way of a purchase money mortgage, or a conditional sale, or a bill of lading running to the seller's order, or to the order of a banker who is financing the transaction for the seller (Williston on Sales, 2d Ed. (1924), Sec. 286–b).

As shown above, under the pressure of wartime emergency, formal provisions, representing practices long followed by the sellers in their ordinary commercial transactions, remained in the new wartime contracts with no actual purpose, as they were inapplicable to dealings with the Government. On the other hand, to effectuate the well-known governmental policy to utilize the benefit of land-grant rates, the parties overrode the form provisions by requiring that the "property" pass on delivery to the initial carrier, by shipping the goods on government bill of lading. The long-established policy and practice of the United States, known to all large shippers and carriers, has been to take title at as early a stage as possible, generally at the initial point of shipment, so as to ship on government bills of lading and derive the fullest advantage of land-grant reductions. *Illinois Central R. R.* v. *United States.* 265 U. S. 209. The practical construction by the sellers in shipping on government bill of lading alone should be dispositive. The Maritime Commission can hardly be suspected of having openly used government bills of lading for nongovernment property.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed insofar as it held that the shipments covered by government bills of lading Nos. MC–88579, MC–22992, MC–28270, and MC–34759 were not property of the United States at the time of shipment and entitled to land-grant rates under Section 321 (a) of the Transportation Act of 1940, and the District Court should be instructed to enter judgment for the United States in regard thereto.

Respectfully submitted.

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APPENDIX

TABLE I

Seller and Shipping Point	Contract or Purchase Order	Carrier's Freight Bill	Government Bill of Lading	District Court's Ruling on Freight Rate
Foster-Wheeler Corp., Carteret, N. J.	MCc-3173 (R. 23)	F-18436-3	MC-218872	Land-Grant.
Combustion Engineering Co. Inc., Chattanooga, Tennessee.	MCc (ESP)-1008 (R. 25)	F-10611-1	MC-21162	Land-Grant.
Inland Steel Co., Indiana Harbor, Ind.	MCc (ESP)-1520 (R. 26)	F-10503-12	MC-88579 (R. 65)	Commercial.
Carnegie-Illinois Steel Corporation, Munhall, Penna.	MCc (ESP)-1145 (R. 29)	F-10610-1	MC-229922 (R. 66)	Commercial.
Jones & Laughlin Steel Corporation, Pittsburgh, Penna.	MCc (ESP)-1016 MCc (ESP)-1083 (R. 30)	F-10610-1 F-10610-1	MC-19113 (R. 67)	Land-Grant.
Otis Steel Co., Cleveland, Ohio	MCc (ESP)-1837 (R. 32)	F-10540-1	MC-28270 (R. 68)	Commercial.
Youngstown Sheet & Tube Co., Youngstown, Ohio.	MCc (ESP)-2690 (R. 33)	F-10540-1	MC-34759 (R. 69)	Commercial.
Republic Steel Corp., Alabama City, Ala.	MCc-7300	F-21750-7	MC-411214	Land-Grant.
			MC-411234	Land-Grant.
			MC-411239	Land-Grant.
			MC-411273	Land-Grant.
Joshua Hendy Iron Works, Sunnyvale, California.	MCc (ESP)-1028 (R. 37)	F-10535-1	MC-16623	Land-Grant.
			MC-16624	Land-Grant.
			MC-16626	Land-Grant.
			MC-16627	Land-Grant.
			MC-16629	Land-Grant.
Joshua Hendy Iron Works, Sunnyvale, California	MCc (ESP)-1020 (R. 38)	F-11274-4	MC-37295	Land-Grant.
			MC-37321	Land-Grant.
			MC-37322	Land-Grant.
			MC-37325	Land-Grant.
			MC-37326	Land-Grant.

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